

Laredo Packing Company and Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 171, a/w Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Cases 23-CA-6444, 23-CA-6520, 23-CA-6762, and 23-CA-6797

31 July 1984

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND DENNIS

On 25 February 1983 Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,¹ findings, and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Laredo Packing Company, Laredo, Texas, its officers, agents, successors, and assigns, shall pay Oscar Martinez the sums set out in the recommended Order.

¹ In agreeing with the judge that the Board's Supplemental Decision and Order reported at 264 NLRB 245 (1982), in a related backpay proceeding between the parties, resolved issues which may not under the doctrine of res judicata be relitigated in the present backpay proceeding, we note that the Board's Order in that case has been enforced by the Fifth Circuit. 730 F.2d 405 (5th Cir. 1984).

² In adopting the judge's conclusion that the Respondent has not shown that Oscar Martinez incurred a willful loss of interim earnings during the backpay period, we rely in part on Martinez' testimony that during 1978 he made job applications to various independent truckers and made telephone inquiries in response to local newspaper want ads.

We disavow reliance on the judge's citation to *Big Three Industrial Gas Co.*, 263 NLRB 1189 (1982), involving an issue not now before us.

SECOND SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. A hearing in this case was held before me on December 2, 1982, in Laredo, Texas, to determine the amount of backpay for Oscar Martinez which would make him whole for his losses resulting from his discharge on April 29, 1977, which discharge, among others, was found to be unlawful by the Board in its Decision and Order issued

on March 19, 1979.¹ The Court of Appeals for the Fifth Circuit enforced in full the backpay provisions of the Board's Order in its opinion dated September 8, 1980.² The Supreme Court denied Respondent's petition for a writ of certiorari on January 12, 1981.³ A controversy arose over the amount of backpay due under the terms of the Board's Order, and the Regional Director for Region 23 of the National Labor Relations Board issued a backpay specification and notice of hearing on September 11, 1981. A backpay hearing was held before an administrative law judge on January 12, 1982. Administrative Law Judge Wacknov issued his Supplemental Decision on May 21, 1982. Administrative Law Judge Wacknov directed Respondent to pay 15 of the 16 discriminatees specific amounts of backpay, plus interest and, on the location of discriminatee Oscar Martinez, the Regional Director for Region 23 of the Board, absent an informal settlement, was to issue a supplemental backpay specification and notice of hearing. The Board on September 28, 1982, issued its Supplemental Decision and Order affirming Administrative Law Judge Wacknov's Supplemental Decision.⁴

On the entire record in this case, including my observation of the demeanor of the witnesses, and with careful consideration of the briefs submitted on behalf of counsel for the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE ISSUES

A. Whether the issue of the uninsurability of the claimant (Oscar Martinez) is barred by the doctrine of res judicata, and whether an alleged offer of a nondriving job to the claimant tolled Respondent's liability to the claimant.

B. Whether the claimant (Oscar Martinez) failed to exercise reasonable diligence with respect to obtaining interim employment, and whether the claimant (Oscar Martinez) remained in the labor market during the entire backpay period.

II. THE EVIDENCE

A. Background

The Board held in its decision,⁵ that eight truckdrivers had been discriminatorily discharged. One of the eight truckdrivers was the claimant herein, Oscar Martinez. Each of the eight drivers, except Martinez, appeared and testified at the backpay hearing before Administrative Law Judge Wacknov on January 12 and 13, 1982. Martinez was subpoenaed by Respondent but failed to appear at that hearing. Counsel for the General Counsel represented in that hearing that his efforts to locate Martinez had been unsuccessful. Respondent took the position in that proceeding that Martinez' name should be stricken

¹ 241 NLRB 184 (1979).

² 625 F.2d 593 (5th Cir. 1980).

³ 106 LRRM 2137 (1981).

⁴ 264 NLRB 245 (1982).

⁵ 241 NLRB 184 (1979).

from the backpay specification. Counsel for the General Counsel maintained in that proceeding that Respondent should remit the amount set forth in the backpay specification to the Regional Director for Region 23 to be held in escrow pending further efforts to locate Martinez. Administrative Law Judge Wacknov ordered that a specified amount be held by the Regional Director in escrow for a period not to exceed 1 year from the date of his Supplemental Decision, and that, on locating Martinez, Respondent be afforded an opportunity to examine him regarding the amount of its backpay liability to him. Judge Wacknov further directed that if no mutually agreeable resolution of the matter was arrived at, that a supplemental backpay specification should issue to determine the backpay due Martinez. Administrative Law Judge Wacknov, in his Supplemental Decision, addressed the issue of the uninsurability of the eight truckdrivers who had been terminated on April 29, 1977. In the same decision and related thereto, Administrative Law Judge Wacknov addressed himself to the issue of whether Respondent could have reemployed any of the discriminatees as drivers on May 31, 1977, and he also addressed himself to whether the drivers were obligated to accept nondriving jobs offered to them by Respondent.

Respondent, in the instant case, attempted to present evidence that Martinez was uninsurable by its insurance carrier. I precluded Respondent from attempting to prove that the claimant (Oscar Martinez) was uninsurable on the basis that the law of the case⁶ estopped Respondent from doing so. Respondent made an offer of proof concerning the uninsurability of Martinez, which offer was rejected. Respondent also attempted to prove that it had offered a nondriving job to the claimant (Oscar Martinez), and that such a job would have been suitable because of the claimant's alleged driving record. I again precluded Respondent from developing evidence thereon. Respondent made an offer of proof with respect to the nondriving job, which offer was rejected.

Respondent also questioned whether Martinez had sought interim employment; however, it conceded the appropriateness of the backpay formula used by counsel for the General Counsel.

The previous Board Decisions⁷ described Respondent's operations, and it is unnecessary to restate those descriptions.

B. Whether the Issue of the Uninsurability of Martinez is Barred by the Doctrine of Res Judicata and Whether an Alleged Offer of a Nondriving Job to the Claimant Tolled Respondent's Liability to the Claimant

Respondent herein attempted to introduce a letter from its insurance carrier in an effort to demonstrate that the eight drivers, including the claimant (Martinez), were uninsurable. I rejected the offered exhibit (R. Exh. 3, Rejected Exhibit File). As noted above, Respondent made an offer of proof regarding nondriving jobs being offered to the eight drivers, including Martinez. Respondent's offer of proof, as indicated above, was rejected. Re-

spondent also attempted to develop still further evidence with respect to the uninsurability of Martinez. Again, Respondent was limited to an offer of proof on the matter, which offer was rejected. Respondent's position in summary form was that Martinez was uninsurable, and that Respondent's alleged offer of a nondriving job to him within 2 weeks of the time he was terminated tolled his backpay until the claimant was offered reinstatement in December 1978. Respondent contends that Martinez' driving record rendered him unsuitable for work as a driver, and as such, it offered him a nondriving job.

Counsel for the General Counsel took the position that the Board's findings and conclusions in the prior proceedings were binding on Respondent, and that it may not attempt to relitigate them in the instant case.

Administrative Law Judge Wacknov, in his Supplemental Decision which was adopted by the Board,⁸ discussed at section A, "The Uninsurability Issue (Discharges of April 29, 1977)" as follows:

Eight truckdrivers were unlawfully discharged on April 29, 1977. They are . . . Oscar Martinez . . . Respondent maintains that the backpay period for these employees begins on April 29, 1977, the date of their discharge, and ends when they either refused Respondent's May 1977 offer of temporary reinstatement to positions other than truckdriving jobs pending their reinstatement as truckdrivers when they became insurable . . .

Counsel for the General Counsel argues, to the contrary, that the backpay period for the aforementioned employees continued until December 1978, when a valid offer of reinstatement was admittedly made.

In its detailed analysis of the issue, and in support of its finding of a discriminatory motivation for the discharge of the truckdrivers, the Board repeatedly emphasized that the Respondent acted precipitously in acceding to the demands of its insurance agent and carrier, and discharged the aforementioned drivers without first investigating, on a specific driver-by-driver basis, the insurance carrier's underlying rationale for excluding each driver from insurance coverage. Thus, the Board suggested that Respondent could have contacted the insurance agent or carrier to ascertain whether insurance coverage had been mistakenly denied, or if alternate insurance might have been available at additional costs with the same or another carrier, and even posited questions which Respondent could have asked concerning the matter.

At the backpay hearing, Respondent presented un rebutted evidence showing that it was, at the time of the April 1977 discharges, in an assigned high-risk insurance classification, and was then paying 180 percent of the customary premium for coverage; that there was not even a remote expectation that it could obtain insurance from another carrier at any cost; and moreover, even if such insur-

⁶ 264 NLRB 245 (1982).

⁷ 241 NLRB 184 (1979), and 264 NLRB 245 (1982).

⁸ 264 NLRB 245 (1982).

ance would have been available, the cost would have been prohibitive.

However, Respondent presented no evidence showing that, at the time it offered temporary reinstatement to the employees in nondriving positions pending their insurability, it would have been unable to change the insurance carrier's decision with respect to any particular employee on the basis that the carrier had made a mistake in the denial of coverage. It would appear that evidence of this nature would have been obtainable through the testimony of representatives of the insurance carrier or Respondent's insurance agent. Nor did Respondent attempt to prove that current evidence of this nature was unavailable at the time of the backpay hearing.

Such evidence would have shown whether, as of about May 31, 1977, the Respondent could then have reemployed any of the employees as drivers. Assuming that the evidence would have supported Respondent's position that the drivers were indeed uninsurable, then the action it took in offering temporary reinstatement to the drivers in alternate positions would have tolled backpay as of that date. As no such evidence was presented, I find that the offers of reinstatement to alternate nondriving positions did not toll Respondent's backpay obligation.

It is readily apparent from the quote set forth above that the issue of the uninsurability of Martinez was before the judge, and that he ruled on the matter. It is likewise just as clear that the issue of whether the offer of the nondriving jobs to the discriminatees tolled their backpay was before the administrative law judge, and he also ruled on that issue. The judge ruled against Respondent on both issues. The judge's decision was subsequently adopted by the Board. The sum and substance of the above-quoted portions of the decision clearly indicate that the issues in question were judicially and finally decided in that case. The identical issues, persons, and parties were before the judge in the previous proceeding. The adoption of his decision by the Board constituted a final judgment by a body of competent jurisdiction on the matters in issue, and as such, is conclusive as between the parties in that or any subsequent proceeding, and it constitutes an absolute bar to relitigating the same issues in the instant hearing. I am fully persuaded that the doctrine of *res judicata* bars Respondent from relitigating the issues it attempts to, namely, whether Martinez was uninsurable during the times in issue, and further, whether Respondent's alleged offer of reinstatement to an alternate nondriving position for Martinez tolled Respondent's backpay obligation to him. I am bound by the law of the previous case which clearly indicated that Respondent had not met its burden of establishing that the drivers were uninsurable and further, that the offers of nondriving positions to the drivers did not toll Respondent's backpay obligation to them.⁹ See *Brown &*

⁹ I need not resolve the conflict in testimony as to whether Martinez was ever offered a nondriving position inasmuch as I am bound by the law of the previous case which indicated that the offers of nondriving

Root, Inc., 132 NLRB 486, 492-493 (1961), *enfd.* 311 F.2d 447 (8th Cir. 1963), and *Schoor Stern Food Corp.*, 248 NLRB 292 at 295 (1980); compare *Teamsters Local 70 (Nielson Freight Lines)*, 265 NLRB 220 at fn. 1 (1982). I, therefore, reject Respondent's contention that Martinez was uninsurable or that his backpay had been tolled by any alleged offer of reinstatement to a nondriving position.

C. Whether the Claimant (Oscar Martinez) Failed to Exercise Reasonable Diligence with Respect to Obtaining Interim Employment and Whether the Claimant (Oscar Martinez) Remained in the Labor Market During the Entire Backpay Period

Respondent contends that Martinez incurred a willful loss of earnings by failing to diligently look for interim work following his termination. Respondent contends Martinez only sought employment during the first couple of months following his discharge. Respondent contends that the nature of Martinez' driving record affected the reasonableness of his search in that a potential employer would not employ him as a driver based on his driving record.

Counsel for the General Counsel contends that the record evidence establishes that Martinez diligently sought other employment and incurred no willful losses of earnings during the entire backpay period. The General Counsel contends that Respondent's backpay liability is as pled in the Supplemental Backpay Specification without any modification. The backpay period for Martinez, according to the General Counsel, was from April 29, 1977, until December 26, 1978.

Martinez testified that, his employment was terminated at Respondent on April 29, 1977. It is acknowledged that Respondent offered Martinez reemployment in December 1978. Martinez testified that after he was discharged on April 29, he had 2 weeks of vacation coming to him which he took. Martinez testified he took the vacation time because he was told that he would be called back after a while to employment with Respondent. After Martinez took his 2 weeks' vacation, he registered with the Texas Employment Commission. The Texas Employment Commission called Martinez twice about signing up for employment, once at Laredo Hardware and once at the Laredo Air Force Base. Both positions were for truckdrivers; however, both jobs were filled according to Martinez at the time he made application. Martinez testified he thereafter, on his own, made application at various places for employment. Martinez testified that at some of the locations he filled out written applications whereas others did not require or permit him to do so. Martinez testified he gained employment as a truckdriver in November 1978, at Ruben Gonzalez Brick Sales.

During the period of his unemployment, Martinez testified he sought employment at Julio Trevino, a wholesale grocery company, where he attempted to be employed as a truckdriver. Martinez sought employment with Trevino in May 1977. Martinez testified he also ap-

positions to the drivers did not toll Respondent's backpay liability to them.

plied for employment at Chromalloy at about the same time. Martinez testified he went twice to Chromalloy about employment. Martinez testified he filled out an application at Halliburton and on the application, he was required to list any traffic violations he had. Martinez testified he truthfully indicated on the application that he had had two accidents and four speeding violations since April 26, 1974. Martinez made application at Halliburton first in May 1977. Martinez went to Halliburton four times to seek employment, and one of those times was in 1978. Martinez testified he sought employment at Western Oil Company in May 1977. Martinez testified that at those places where he filled out an application, he indicated a first preference for a truckdriving position, but indicated other preferences as well on the applications. Martinez testified he sought employment at Crystal Wells in June 1977. Martinez testified he thereafter sought employment at Delta Mud, which was an outfit that transported mud to oil rigs. Martinez listed his first choice as a truckdriver at Delta Mud, however, he listed other choices as well. Thereafter, Martinez sought employment at Howell which operated an oil rig business in Laredo, Texas.

Martinez testified that, during his unemployment, he observed the want ads in the local paper and made telephone inquiries regarding them. Some of the ads that he responded to were for mechanic positions and others were for carpentry jobs. Martinez testified after May, June, and July 1977, he visited various independent truck haulers and inquired about employment with them. Martinez testified he was not hospitalized nor did he suffer any injury during the period of time in question. I credit Martinez' undisputed testimony concerning his seeking employment.

In making a determination as to whether an employee has forfeited backpay, the following legal principle is applicable.¹⁰

An employer may mitigate his backpay liability by showing that a discriminatee "willfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment," (*Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 199-200 (1941)), but this is an affirmative defense and the burden is upon the employer to prove the necessary fact. *N.L.R.B. v. Mooney Aircraft, Inc.*, 266 F.2d 809, 813 (C.A. 5, 1966). The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or a low interim earning; rather the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (C.A. 5, 1966). Moreover, although a discriminatee must make "reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable assertion in this regard, not the highest standards of diligence." *N.L.R.B. v. Arduini Manufacturing Co.*, 394 F.2d 420, 422-423 (C.A. 1, 1968). Suc-

cess is not the measure of the sufficiency of the discriminatee's search for interim employment; the law "only requires an honest good faith effort." *N.L.R.B. v. Cashman Auto Co.*, 223 F.2d 832, 836 (C.A. 1). And in determining the reasonableness of this effort, the employee's skill and qualification, his age, and the labor conditions in the area are factors to be considered, *Mastro Plastic Corp.*, 136 NLRB 1342, 1359.

Both the General Counsel and Respondent point out that the test for whether an individual claimant has made a reasonable search for employment is to be based "on the record as a whole," with respect to whether, "the employee has diligently sought other employment during the entire backpay period." *Saginaw Aggregates*, 198 NLRB 598 (1972); see also *Cornwell Co.*, 171 NLRB 342 (1968). In determining the reasonableness of a search for interim employment, it is also necessary to consider the skill, background, and experience of the claimant, and to consider the area in which the search was made to see if, in the light of all the surrounding circumstances, it can be stated that a reasonable continuing search has been made for interim employment such as to foreclose a finding of willful loss of backpay.

Applying the foregoing principles, I find that Respondent has not shown that Martinez incurred a willful loss of interim earnings. The credited testimony of Martinez indicates that he not only registered with the Texas Employment Commission, but also actively sought employment on his own. Martinez sought employment with various trucking concerns in an effort to obtain employment as a truckdriver or other related work. After not having success with the various concerns that Martinez could recall making application with, he then resorted to a search of newspaper want ads seeking various types of employment, including mechanic and carpentry positions. Additionally, Martinez sought employment with various independent truckers. It is recognized that a lapse of time usually tends to dim ones' memory regarding specifics of a matter; therefore, I do not infer a lack of diligence on the part of Martinez because he could not specifically remember the names of any other employers with whom he made efforts to be employed. I am fully persuaded that Respondent failed to demonstrate that Martinez incurred any willful loss of interim earnings. Without more than is available in this record, I am not persuaded that the driving record of Martinez was such that I should infer that it in any way diminished the reasonableness of his search for employment between April 29, 1977, and December 1978. I reject Respondent's contention in that regard.

There is no indication in this record that Martinez' vacation, which he took when he was terminated, was other than accrued vacation, and, as such, I find it does not require any reduction in the amount of backpay due Martinez. With respect to the fourth quarter of 1978, I find in agreement with Respondent that Martinez' earnings at Ruben Gonzalez Brick Sales was \$1540 as opposed to the \$1433 reflected in the backpay specification of the General Counsel. Martinez' W-2 form filed with

¹⁰ *Aircraft & Helicopter Leasing*, 227 NLRB 644 at 646 (1976). See also *Big Three Industrial Gas*, 263 NLRB 1189, 1197 at fn. 25 (1982).

the Internal Revenue Service reflected \$1540. Martinez acknowledged that his W-2 form was correct.

CONCLUSIONS OF LAW

The backpay formula as propounded by the General Counsel is appropriate in determining the moneys due Martinez to make him whole for losses incurred by him as a result of the discrimination practiced against him from April 29, 1977, to December 26, 1978.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation¹¹

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent Laredo Packing Company, its officers, agents, successors, and assigns, shall make whole Oscar Martinez by paying him the sum of \$14,301,¹² plus interest thereon in the manner heretofore prescribed in this case.

¹² The quarterly amounts are:

Second quarter 1977	\$ 1,541
Third quarter 1977	2,208
Fourth quarter 1977	1,854
First quarter 1978	2,773
Second quarter 1978	2,602
Third quarter 1978	2,397
Fourth quarter 1978	926
Total	\$14,301